

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**NORTH AMERICAN FUNDING GROUP, LLC,
Plaintiff,**

v.

**Case No. 13-132240-CZ
Hon. James M. Alexander**

**DUMITRU SANDULESCU,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant’s motion for partial summary disposition. According to its Complaint, Defendant contracted for Plaintiff to obtain a commercial loan for property to be used in a Defendant business venture. Plaintiff claims that it successfully secured a loan for \$588,000, but Defendant refused to pay Plaintiff’s commission. Plaintiff then filed the present suit – seeking said commission on a single breach of contract claim.

In response to Plaintiff’s Complaint, Defendant countersued on claims that Plaintiff actually failed to timely secure financing for property, which caused Defendant to lose an earnest money deposit and the opportunity to purchase property to be used as a medical office center. Defendant’s two-count Counterclaim alleges claims for breach of contract and injunctive relief.

Defendant now moves for partial summary disposition of: (1) Plaintiff’s claim for unpaid commissions (Plaintiff’s Count I), and (2) its claim for an injunction and return of a previously paid partial commission (Defendant’s Counterclaim Count II). Defendant bases its request on the

argument that neither Plaintiff nor its owner is licensed under the Occupational Code, and therefore, is unable to earn compensation on the transaction.

To his end, Defendant moves for summary disposition under MCR 2.116(C)(5), (C)(8) or (C)(10). A motion under MCR 2.116(C)(5) challenges whether a plaintiff lacks the legal capacity to sue. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). A (C)(8) motion tests the legal sufficiency of the complaint, and a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

1. Plaintiff's claim for unpaid commission (Plaintiff's Count I).

In support of his argument, Defendant relies on Michigan's Occupational Code, which provides at MCL 339.601(a): "A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possesses a license or registration issued by the department for the occupation."

The Code includes a "real estate broker" as one of the covered occupations, which is defined as: "an individual, sole proprietorship, partnership, association, corporation, common law trust, or a combination of those entities who with intent to collect or receive a fee, compensation, or valuable consideration . . . negotiates the . . . mortgage of real estate." MCL 339.2501(h).

Defendant claims that Plaintiff's role was to negotiate and obtain a mortgage on the property that Defendant wished to obtain. Because it is undisputed that Plaintiff was unlicensed to do so, Defendant argues that Plaintiff cannot maintain the present lawsuit under MCL 339.2512a, which provides:

A person engaged in the business of, or acting in the capacity of, a person required to be licensed under this article, shall not maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article at the time of the performance of the act or contract.

In response, Plaintiff argues (1) it does not negotiate mortgages, and (2) the Occupational Code does not apply to commercial real property.

Plaintiff first argues that it does not negotiate mortgages with lenders. Rather, it “places the loan with the lender whose **imposed** terms best suit the needs of the client.” (emphasis in original). Plaintiff argues that its “sole function is to shop around for a lender by packaging the client’s financials and business plan in a format required by lenders to consider a loan.” And this, Plaintiff argues, is somehow not negotiating mortgages with lenders. The Court disagrees. Negotiating mortgages is precisely what Plaintiff is doing.

In the alternative, Plaintiff argues that the legislature didn’t intend the Occupational Code to apply an entity whose “sole function is only one of thirty-one activities” listed in MCL 339.2501(h).¹ But the Court rejects this argument because the legislature chose to use the word “or” in the statute. In so doing, the legislature indicated its intent to apply the statute to an entity that performs any one of the listed activities.

¹ The entire text of MCL 339.2501(h) is:

“Real estate broker” means an individual, sole proprietorship, partnership, association, corporation, common law trust, or a combination of those entities who with intent to collect or receive a fee, compensation, or valuable consideration, sells or offers for sale, buys or offers to buy, provides or offers to provide market analyses, lists or offers or attempts to list, or negotiates the purchase or sale or exchange or mortgage of real estate, or negotiates for the construction of a building on real estate; who leases or offers or rents or offers for rent real estate or the improvements on the real estate for others, as a whole or partial vocation; who engages in property management as a whole or partial vocation; who sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the goodwill of an existing business for others; or who, as owner or otherwise, engages in the sale of real estate as a principal vocation.

Finally, Plaintiff argues that the statute was not intended to apply to commercial real estate transactions. But Plaintiff fails to cite any authority that has interpreted the cited code as such. And the plain text of the statute does not state that it only applies to residential transactions. It contains no such condition.

Further, although not cited by Defendant, Michigan's Commercial Real Estate Broker's Lien Act, at MCL 570.583, provides "A commercial real estate broker's lien is only available to an individual licensed as a real estate broker **under article 25 of the occupational code, 1980 PA 299, MCL 339.2501 to 339.2518.**"

In other words, at least one other Michigan statute states that a "commercial real estate broker" must be licensed as such under the cited sections of the Occupational Code. To accept Plaintiff's interpretation, this Court would have to ignore the plain text of other another Michigan statute. The Court will not do so.

For all of the foregoing reasons, the Court finds that the Occupational Code applies to commercial real estate brokers, such as Plaintiff. And Plaintiff's failure to be licensed prohibits it from maintaining the present lawsuit for unpaid commission or compensation under MCL 339.2512a.

As a result, accepting all well-pled allegations as true and construing them in the light most favorable to Plaintiff, the Court finds that Plaintiff's claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. As a result, Defendant's motion is GRANTED, and Plaintiff's Complaint is DISMISSED under (C)(8).

2. Defendant's injunctive relief claim (Defendants Counterclaim Count II)

Defendant next seeks an injunction prohibiting Plaintiff from “selling, offering to sell, buying, offering to buy, negotiating, listing, and/or brokering real estate, business opportunities, and/or mortgages and loans” under MCL 339.601 (emphasis added).

The cited statute provides:

(9) Notwithstanding the existence and pursuit of any other remedy, an affected person may maintain injunctive action to restrain or prevent a person from violating subsection (1) or (2). If successful in obtaining injunctive relief, the affected person shall be entitled to actual costs and attorney fees.

...

(11) As used in subsection(9), “affected person” means a person directly affected by the actions of a person suspected of violating subsection (1) or (2) and includes, but is not limited to, a licensee or registrant, a board established pursuant to this act, the department, **a person who has utilized the services of the person engaging in or attempting to engage in an occupation regulated under this act or using a title designated by this act without being licensed or registered by the department**, or a private association composed primarily of members of the occupation in which the person is engaging in or attempting to engage in or in which the person is using a title designated under this act without being registered or licensed by the department.

Defendant argues that he is an “affected person” under the definition of MCL 339.601(11), and as such, he can maintain an injunctive action under MCL 339.601(9) against Plaintiff for its failure to be licensed when it performed work for Defendant.

Plaintiff's Response fails to address this request for relief, and the Court has specifically rejected Plaintiff's argument that the Occupational Code does not apply to it.

Indeed, the plain language of the cited statute provides that Defendant can maintain an injunctive action against Plaintiff as an “affected person.” Since it is undisputed that Plaintiff acted as an unlicensed commercial mortgage broker in violation of the Occupational Code, Defendant is entitled to the injunctive relief sought in his Counterclaim Count II.

As a result, Defendant's motion is GRANTED, and the Court will enjoin Plaintiff from "selling, offering to sell, buying, offering to buy, negotiating, listing, and/or brokering real estate, business opportunities, and/or mortgages and loans" until it obtains the required license under MCL 339.601(1).

Further, under MCL 339.601(9) (emphasis added), "[i]f successful in obtaining injunctive relief, the affected person **shall** be entitled to actual costs and attorney fees." Because the Court has granted Defendant's request for an injunction, the Court is required to award Defendant his actual costs and attorney fees. Defendant may file an appropriate motion for the same.

Defendant also requests the return of \$6,750 of fees already paid to Plaintiff, citing MCL 339.601(8), which provides "[a]ny violation of this act shall include a requirement that restitution be made, based upon proofs submitted to and findings made by the trier of fact as provided by law."

It is undisputed that Defendant already paid Plaintiff \$6,750 for work that Plaintiff performed as an unlicensed commercial real estate broker in violation of the Occupational Code. As a result, the Court finds that Plaintiff must return said amount to Defendant pursuant to MCL 339.601(8).

To summarize, Defendant's motion for partial summary disposition is GRANTED in its entirety.

The sole remaining claim in this case is Defendant's Counterclaim Count I for breach of contract.

IT IS SO ORDERED.

October 7, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge